Si & Si Sdn Bhd v Hazrabina Sdn Bhd

SUPREME COURT (JOHOR BAHRU) — CIVIL APPEAL NO 02-3 OF 1995
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN AND MOHAMED DZAIDDIN FCJJ
12 APRIL 1996

Companies and Corporations *— Winding up — Claim for damages against petitioner — Application to strike out petition pursuant to O 18 r 19(1) of Rules of the High Court 1980 — Respondent claimed resulting loss and damages in same application — Whether necessary for respondent to proceed by way of separate action against petitioner on tort of malicious prosecution or for abuse of process — Rules of the High Court 1980 O 18 r 19(1)(b), (c) & (d)*

The appellant in this case ('the petitioner') had filed a winding-up petition against the respondent company under s 218(1) of the Companies Act 1965 ('the Act') on the ground that the respondent was unable to pay its debts, ie RM18,260.70, being the balance of the purchase price of goods sold and delivered together with interest. An order for winding up was eventually granted by the court. However, by consent of the parties, the winding-up order was set aside, and the petition was set down for full hearing. Meanwhile, the respondent filed an application by way of a notice of motion pursuant to O 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980 ('the RHC'), for an order to strike out the petition. The respondent further claimed for damages in the notice of motion on the basis that its bank accounts was frozen and that it was unable to carry on its business activities following the issuance of the winding-up petition against it. The High Court judge found that the presentation of the winding-up petition by the petitioner was an abuse of the process of the court under O 18 r 19 (1)(d). He went on to order, inter alia, that the winding-up petition be struck out, and that damages be paid to the respondent to be assessed by the senior assistant registrar. The appellant appealed, and leave to appeal to the (then) Supreme Court in respect of the judge's decision in awarding damages to the respondent was granted. The issue before the Supreme Court was therefore, whether the judge was right in awarding damages against the petitioner.

Held, allowing the appeal:

(1) It is not within the contemplation of O 18 r 19(1) of the RHC to grant damages to the successful applicant, in addition to its powers under the rule or under its inherent jurisdiction. Clearly, the policy of O 18 r 19 RHC is to prevent the improper use of the

court's machinery, and therefore in a proper case, it will summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see p 514D).

(2) An application for winding up, even if subsequently dismissed as being ill-founded, can damage a solvent company's reputation. However, it has been established that any action for damages against a petitioner, whose petition for winding up has been struck out, can only be brought by an entirely separate suit founded on a tort of malicious prosecution or for abuse of process (see pp 514F and 515G–H); *The Quartz Hill Consolidated Gold Mining Co v Eyre* [1883] 11 QBD 674 and *QIW Retailers Ltd v Felview Pty Ltd* [1989] 7 ACLC 519.

(3) In the circumstances of the case, the judge was wrong, upon striking out the appellant's petition for winding up of the respondent as being an abuse of process, to grant damages to the respondent. There had to be a separate action for damages (see p 515I).

[Bahasa Malaysia summary

Perayu di dalam kes ini ('pempetisyen') telah memfailkan petisyen penggulungan terhadap syarikat penentang di bawah s 218(1) Akta Syarikat 1965 ('Akta tersebut') atas alasan bahawa penentang gagal untuk membayar hutangnya sebanyak RM18,260.70 iaitu baki bayaran pembelian barangan yang dijual dan dihantar bersama dengan faedah. Perintah penggulungan telah diberikan oleh mahkamah. Bagaimanapun, dengan keizinan pihak-pihak itu, perintah penggulungan itu telah diketepikan, dan petisyen itu telah ditetapkan untuk perbicaraan penuh. Sementara itu, penentang telah memfailkan permohonan dengan cara notis usul mengikut K 18 a 19(1)(b), (c) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980('KMT'), memohon perintah untuk membatalkan petisyen itu. Penentang juga menuntut untuk ganti rugi dalam notis usul atas alasan bahawa bank akaunnya telah dibekukan dan ia tidak dapat meneruskan aktiviti-aktiviti perniagaannya akibat pengeluaran petisyen penggulungan terhadap penentang. Hakim mahkamah tinggi mendapati bahawa pengemukaan petisyen penggulungan oleh pempetisyen adalah satu penyalahgunaan proses mahkamah di bawah K 18 a 19(1)(d). Hakim itu telah memerintahkan, antara lain, supaya petisyen penggulungan itu dibatalkan, dan ganti rugi dibayar kepada penentang untuk ditaksirkan oleh penolong kanan pendaftar. Perayu merayu, dan kebenaran untuk merayu kepada Mahkamah Agung pada masa itu berkenaan dengan keputusan hakim itu mengawardkan gantirugi kepada penentang, telah diberikan. Oleh itu, isu di hadapan Mahkamah Agung ialah, sama ada hakim itu adalah betul dalam mengawardkan ganti rugi kepada pemetisyen.

Diputuskan, membenarkan rayuan itu:

(1) Adalah tidak difikirkan bahawa K 18 a 19(1) KMT boleh mengawardkan gantirugi kepada pemohon yang berjaya, sebagai tambahan kepada kuasanya di bawah kaedah itu atau di bawah bidang kuasa sedia adanya. Adalah jelas, polisi K 18 a 19 KMT adalah untuk menghalang penyalahgunaan mekanisme mahkamah, dan oleh itu dalam kes-kes yang sepatutnya, ia akan menghalang secara terus mekanismenya daripada digunakan sebagai satu cara untuk menyusahkan dan menindas dalam proses litigasi (lihat ms 514D).

(2) Permohonan untuk penggulungan, walaupun kemudiannya ditolak kerana tidak mempunyai alasan-alasan yang kukuh, boleh merosakkan reputasi syarikat yang solven. Bagaimanapun, adalah satu perkara yang telah ditetapkan bahawa sesuatu tindakan untuk menuntut gantirugi terhadap pempetisyen, di mana petisyennya untuk penggulungan telah dibatalkan, hanya boleh dibuat dengan guaman yang berasingan, berdasarkan kepada tort pendakwaan niat jahat atau penyalahgunaan proses (lihat ms 514F dan 515G–H); *The Quartz Hill Consolidated Gold Mining Co v Eyre* [1883] 11 QBD 674 and *QIW Retailers Ltd v Felview Pty Ltd* [1989] 7 ACLC 519.

(3) Dalam keadaan kes ini, hakim itu adalah salah, dalam membatalkan petisyen perayu untuk penggulungan syarikat penentang sebagai penyalahgunaan proses, untuk mengawardkan gantirugi kepada penentang. Satu tindakan yang berasingan hendaklah dibuat untuk menuntut gantirugi (lihat ms 515I).]

Notes

For cases on winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

Cases referred to

Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd [1989] 2 MLJ 423

Peer Mohamed bin Abdul Aleez v Pahang Investments Public Ltd Co ([1989] Mallal's Digest (4th Ed) para 149)

QIW Retailers Ltd v Felview Pty Ltd (1989) 7 ACLC 519

The Quartz Hill Consolidated Gold Mining Co v Eyre [1883] 11 QBD 674

Legislation referred to

Companies Act 1965 s 218(1)

Companies (Winding-Up) Rules 1972

Rules of the High Court O 18 r 19(1)(b), (c), (d)

Companies Acts 1862, 1867 [UK]

Ong Ban Chai (Ong Ban Chai & Co) for the appellants.
Sashi Menon (Majid Krishnan Menon & Lee) for the respondent.

Appeal from: Supreme Court Appeal No 08-24 of 1994 (Kuala Lumpur)

Mohamed Dzaiddin FCJ (delivering the judgment of the court): This appeal arose from an oral decision of the learned judge of the High Court, Johor Bahru given on 26 May 1991 with respect to an award of damages following the striking out of a winding-up petition by the court.

After hearing the counsel on 12 April 1996, we allowed the petitioner's appeal with half costs to the petitioner, and we now give our reasons.

The background to this appeal can be summarized as follows. On 12 November 1990, the appellant, who for the sake of clarity shall be referred to as the petitioners filed a winding-up petition against the respondent company under s 218(1) of the Companies Act 1965 ('the Act') on the ground that the respondent was unable to pay its debts, ie RM18,260.70, being the balance of the purchase price of goods sold and delivered together with interest. On 4 March 1991, an order for winding up was accordingly granted by the court. However, by consent of the parties, the said winding-up order was set aside, and the petition was set down for full hearing. Meanwhile, on 10 January 1991, the respondent filed an application by way of a notice of motion pursuant to O 18 r 19(1)(b), (c) and (d), seeking an order to strike out the petition and for damages and costs. On 26 May 1991, the learned judge granted the application and ordered that the winding-up petition be struck out; that the petitioner do pay damages to the respondent to be assessed by the registrar, and lastly, the petitioner do pay the respondent the costs of the proceedings. On 22 July 1991, leave to appeal to the then Supreme Court against the learned judge's decision in awarding damages to the respondent was granted. Hence, this present appeal.

In arriving at his decision for striking out the winding-up petition under O 18 r 19(1)(d) RHC and awarding damages and costs against the petitioner, there is no doubt in our mind that the learned judge had considered the supporting affidavit of Zainuddin Alani, a director of the respondent, affirmed on 10 January 1991. On the issue of damages, his Lordship must have placed reliance on the following paragraphs of the said affidavit:

> 15 I verily believe the present proceedings herein are scandalous, frivolous, vexatious and it is an abuse of the process of the court.
>
> 16 The petitioner having withdrawn the earlier suit against the respondent is now estopped from proceeding with this action.

A 17 Upon the issue and the service of the winding-up petition, the bank accounts of the respondent has been duly frozen and the respondent is unable to use its banking duly accounts. As the said account is frozen the respondent is unable to carry on its business activities and undue loss and damage has occurred to the respondent.

B However, in the 'Oral Decision', the learned judge did not give any reason for awarding damages against the petitioner but appeared to have followed his earlier decision in *Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd* [1989] 2 MLJ 423, where the facts are quite similar to the facts herein. At p 425 para F, his Lordship concluded:

C I could not help thinking that the filing of the notice of discontinuance and the subsequent presentation of the winding-up petition were all acts calculated to circumvent the normal course of going to trial after the dismissal of the application for summary judgment under O 14 and to embarrass the respondent. In the circumstances I considered the presentation of the winding-up proceedings as an abuse of the process of the court and I D accordingly granted an order in terms of the first three prayers of the application, ie that the petition be struck out, that costs of the application be borne by the petitioner and that a date be fixed for enquiry into the damages suffered by the respondent.

At this juncture, we say, with respect to the learned judge, that in the E above case, he has not given his reasons for granting damages against the respondent in the same application. We tend to think that he did not have the full benefit of reading the decision of the English Court of Appeal in *The Quartz Hill Consolidated Gold Mining Co v Eyre* [1883] 11 QBD 674.

Thus, this appeal raised a single issue as to whether the learned judge F was right in awarding damages against the petitioner in the winding-up petition after striking out the petition as being an abuse of the process of the court. It is therefore necessary to examine the legal issues involved in this appeal.

In *Peer Mohamed bin Abdul Aleez v Pahang Investments Public Ltd Co* G (Mallal's Digest 1989 para 149), P filed a winding-up petition against D. The petition which was served on D was advertised before due clearance had been obtained from the registrar of the High Court in accordance with the Companies (Winding-Up) Rules 1972. Thereafter, P filed a notice of discontinuance of the action against D. The notice was served on D. D H nevertheless filed an affidavit opposing the petition. D claimed that substantial damage had been caused to them by P filing the petition and by having newspaper coverage on baseless and speculative allegations. D asked that the petition be struck out and that damages be paid by P.

Ajaib Singh J dismissed the petition of P. He was of the view that D's I claim for damages against P could not be entertained in the winding-up proceedings as damages did not come within the purview of the proceedings.

He stated that to recover any damages from P, D would have to proceed against P by way of a separate action in court.

Although the learned judge did not give his reasons for the conclusion, nevertheless, we agree with him for the following reason. It is patently clear that P's petition was made under s 218 Companies Act 1948. The court's powers on hearing the petition is governed by s 221, which after hearing the parties, may dismiss it with or without costs, or adjourn it conditionally or unconditionally or may make an interim or other order that it thinks fit. There is therefore no provision in the section for the court when dismissing the petition to award damages to D, although an affidavit in opposition to the petition may pray for damages. It can only dismiss the petition with or without costs.

On the other hand, in the present case, the learned judge, after having found that the presentation of the winding-up petition by the petitioner as an abuse of the process of the court under O 18 r 19 (l)(d), ordered, in addition to giving costs, that the petitioner do pay damages to the respondent to be assessed by the senior assistant registrar. In our view, it is not within the contemplation of O 18 r 19(1) of the RHC to grant damages to the successful applicant, in addition to its powers under the Rule or under its inherent jurisdiction. Clearly, the policy of O 18 r 19 RHC is to prevent the improper use of the court's machinery, and therefore in a proper case, it will summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see 1 *The Supreme Court Practice 1995* para 18/19/33 'Abuse of the Process of the Court'.)

It has been said that an application for winding up, even if subsequently dismissed as being ill-founded, can damage a solvent company's reputation (see *Ford's Principles of Corporations Law* (6th Ed) at p 818). However, it has been established from authorities that any action for damages against a petitioner, whose petition for winding up has been struck out, can only be brought by an entirely separate suit founded on a tort of malicious prosecution (*The Quartz Hill Consolidated Gold Mining Co v Eyre* [1883] 11 QBD 674) or for abuse of process (*QIW Retailers Ltd v Felview Pty Ltd* [1989] 7 ACLC 519).

In the present case, it would appear to us that the respondents' claim for damages in the notice of motion, for which the learned judge ordered that damages be assessed by the senior assistant registrar, was based on the allegations that as a result of the issuance and the service of the winding-up petition against the respondent, its bank accounts were frozen and it was unable to carry on its business activities. In the result, the respondent claimed that it suffered undue loss and damage. However, whether or not he can succeed depends on the evidence.

The Quartz Hill Consolidated Gold Mining Co v Eyre is the case in point. It is a leading case on malicious company liquidation proceedings. In that case, the plaintiff brought an action against the defendant alleging

that the defendant falsely and maliciously and without reasonable or probable cause presented a petition for the winding up of the plaintiff company. The said petition was presented to the court and was advertised in the *London Gazette* and two daily newspapers. A date of hearing was given, but immediately after the presentation of the petition, the defendant ascertained that his shares had been sold and that the transfer had been registered. He therefore gave notice that the petition would be withdrawn. The petition was never served upon the plaintiff company. Ultimately, the court ordered that the petition be dismissed with costs. The English Court of Appeal decided that an action would lie for falsely and maliciously and without reasonable or probable cause presenting a petition under the Companies Acts 1862, 1867 to wind up a trading company, even though no pecuniary loss or special damage to the company could be proved, for the presentation of the petition was, from its very nature, calculated to injure the credit of the company. According to *McGregor on Damages* (14th Ed) para 1370, pecuniary loss by injury, or loss of business, may be included under the head of damages for malicious prosecution.

In *QIW Retailers Ltd v Felview Pty Ltd*, the defendant company, a shareholder of the plaintiff company, presented a winding-up petition against the plaintiff company on the ground that the directors of the plaintiff company had preferred their own interests to those of the members or alternatively acted in an unfair or unjust manner. The application was supported by an affidavit sworn by B, who was not a party to the winding-up application. B had told a journalist, whose article had referred to the application. Consequently, the application was dismissed by the court as an abuse of the process with costs to be taxed. The plaintiff company then brought the present action against the defendant company and B claiming damages, including exemplary damages, for malicious prosecution and for abuse of process. The Queensland Supreme Court held that there was no malicious prosecution but awarded general damages for abuse of process. The court found that the plaintiff company had suffered damage by the presentation of the winding-up petition and the publication of the article giving notice to the public at large. It was a trading company and its creditors displayed some apprehension on hearing of the presentation of the petition.

Thus, the above two cases, aside from establishing that an unjustifiable application for winding up a company can lead to an action for damages against a petitioner for malicious prosecution or for abuse of process of the court, do fortify our view that a claim for damages should not be brought under a winding-up petition or in an application to strike out the said petition under O 18 r 19(1) RHC, but ought to be filed as a separate action by way of a writ.

In the circumstances of the case, and for the above reasons, we are of opinion that the learned judge was wrong, upon striking out the appellant's petition for winding-up of the respondent as being an abuse of process, to

grant damages to the respondent. There has to be a separate action for damages.

Accordingly, we allowed the appeal with half costs of the appeal to the appellant. We also ordered the deposit to be refunded.

Order accordingly.

Reported by Isabel Liong